

DEPARTMENT OF STATE REVENUE

04-20090910P.LOF

**Letter of Findings Number: 09-0910P
Sales and Use Tax – Negligence Penalty
For the Periods 2005-2007**

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration – Negligence Penalty.**Authority:** IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a company doing business in Indiana. The Indiana Department of Revenue ("Department") audited Taxpayer for sales and use tax for the years 2005 to 2007. As a result of the Department's audit, the Department issued proposed assessments of sales and use tax, interest, and penalties. Taxpayer protested only the penalties.

I. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer protests the imposition of the ten percent negligence penalty on the sales and use tax imposed as a result of the Department's audit.

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10-2.1. The Indiana Administrative Code, [45 IAC 15-11-2](#) further provides:

(b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(c) The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Over eighty-five percent of Taxpayer's \$200,000 assessment resulted from three issues: sales to purportedly tax-exempt organizations for which Taxpayer did not receive an exemption certificate, prepaid phone card sales, and sales of items treated as food by Taxpayer but which actually were sales of taxable non-food items such as candy or soft drinks. The transactions that fall within each set have guidelines set forth by statutes and Department interpretations of those statutes. The statutes and Department interpretation of those statutes are not novel or unclear as applied to Taxpayer's operations. Based on Taxpayer's failure to follow statutory procedures on exemption certificates, its failure to collect sales tax on items that Indiana has explicitly stated are taxable, and the magnitude of these failures, Taxpayer has not demonstrated reasonable cause sufficient to justify penalty waiver.

FINDING

Taxpayer's protest is denied.

